HORIZON TECHNOLOGIES INTERNATIONAL LTD.

v.

LUCKY WEALTH CONSULTANTS LTD.

PRIVY COUNCIL (ON APPEAL FROM THE COURT OF APPEAL, HONG KONG]
MAURICE CASEY
LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD ACKNER
LORD BROWNE-WILKINSON
[PRIVY COUNCIL APPEAL NO. 25 OF 1991]
13 NOVEMBER 1991

CIVIL PROCEDURE: *Tomlin order - Whether absolute in its terms and whether could be read together with and subject to the deed - Whether allegation of default under Clause 7 can be invoked. Order 42 r. 5A(2)(b)(iii).*

This appeal involves a Tomlin order made by the High Court of Hong Kong on 9 May 1989 pursuant to a compromise of a commercial action. The form of order takes its name from Tomlin J, who laid it down in a Practice Direction [1927] WN 290 as a means of giving effect to a compromise in an action, and is described in O. 42 r. 5A(2)(b)(iii) as an order for the stay of proceedings upon terms which are scheduled to the order but which are not otherwise part of it.

The action (A248/89) was commenced on 16 January 1989 by the respondent (Lucky Wealth) against the appellant (Horizon) claiming HK$25,984,027.55 alleged to be due under an assignment to it of a debt from Horizon to Flow Chart Investment Limited and Quintuplet Trading Company Limited. As Mr. Cheng who also features in the compromise, is a director of Horizon, Lucky Wealth is alleged to have laid a complaint of a criminal nature shortly afterwards with the authorities in Taiwan against him and another, and to have joined with Flow Chart and Quintuplet in naming complaints to the authorities in China involving him and Horizon.

In April 1989 Lucky Wealth instituted proceedings (740/89) for a committal order against Mr. C and for sequestration of Horizon's property.

By consent the argument was confined to the preliminary point of whether a breach of Clause 7 could constitute a defence, it being assumed for this purpose that there were breaches nullifying the deed of settlement as alleged. Liu J held that Horizon should not be precluded from invoking the provisions in the deed in defence of Lucky Wealth's claim, and accordingly ruled in Horizon's favour on the preliminary point. He adjourned the application for judgment and gave directions for its hearing.

From that decision Lucky Wealth appealed successfully to the Court of Appeal, which concluded that the Tomlin order was absolute in its terms and could not be read together with and subject to the deed. It was also observed that there is no direct authority in England or Hong Kong for the proposition that a party to a Tomlin order, faced with a claim to enforce the Schedule, may rely as a defence on contractual rights not included in that Schedule. It is of course a feature of such order that the Schedule forming the basis of the stay of proceedings is not part of the order. It is simply a record of the compromise reached between the parties.

[Hence this appeal, where the matter now comes before their Lordships.]

Held:

[1] The parties entered into this deed to resolve the complex situation which had developed among them. As part of that settlement Horizon were to pay the amounts set out in the Schedule. That Schedule is clearly an integral part of the deed, but, put, as it were, in parenthesis to take advantage of the Tomlin order procedure for summary judgment, so that the payments could be quickly and cheaply enforced. In their Lordships' opinion, the segregation of those items for that purpose does not remove them from the operation and effect of the rest of the deed.

[2] The whole of that document could have been incorporated in the Schedule, but to do so would have been unwieldy and unnecessary. Sensibly, the parties advisors put in only those terms which were most appropriate for summary enforcement. Nevertheless, as part of the deed, they remain subject to all its provisions. Accordingly, it is open to Horizon to raise the allegation of default under Clause 7 as a possible defence to Lucky Wealth's claim to enforce the order.

[Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of Liu J restored, with such modification of the directions for hearing as he may see fit to make. Respondent to pay the appellant's cost here and before the Court of Appeal.]

Legislation referred to:
Criminal Procedure Ordinance [HK], ss. 90, 91

Other source referred to:
Atkin's Court Forms, (2nd Edn. 1988), Vol. 23 197

JUDGMENT

Sir Maurice Casey:

This appeal involves a Tomlin order made by Liu J in the High Court of Hong Kong on 9 May 1989 pursuant to a compromise of a commercial action. The form of order takes its name from Tomlin J, who laid it down in a Practice Direction [1927] WN 290 as a means of giving effect to a compromise in an action, and is described in O. 42 r. 5A(2)(b)(iii) as an order for the stay of proceedings upon terms which are scheduled to the order but which are not otherwise part of it.

The action (A248/89) was commenced on 16 January 1989 by the respondent (Lucky Wealth) against the appellant (Horizon) claiming HK$25,984,027.55 alleged to be due under an assignment to it of a debt from Horizon to Flow Chart Investment Ltd. and Quintuplet Trading Co. Ltd. A Mr. Cheng, who also features in the compromise, is a director of Horizon. Lucky Wealth is alleged to have laid a complaint of a criminal nature shortly afterwards with the authorities in Taiwan against him and another, and to have joined with Flow Chart and Quintuplet in making complaints to the authorities in China involving him and Horizon. In April 1989 Lucky Wealth instituted proceedings (740/89) for a committal order against Mr. Cheng and for sequestration of Horizon's property.

On 9 May all those involved in the dispute executed the following deed of settlement:

> This Deed is made 9 May 1989
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> Between:
>
> (1) Lucky Wealth Consultants Ltd. [Lucky Wealth], whose registered office is at 16th Floor, Fung House, 19 Connaught Road Central, Hong Kong of the first part;

(2) Flow Chart Investment Ltd. [Flow Chart] whose registered office is at 15th Floor, Fung House, 19 Connaught Road Central, Hong Kong of the second part;

(3) Quintuplet Trading Co. Ltd. [Quintuplet], whose registered office is at 16th Floor, Fung House, 19 Connaught Road Central, Hong Kong of the third part;

(4) Horizon Technologies International Ltd. [Horizon], whose registered office is at 25C-E, Cindic Tower, 128 Gloucester Road, Hong Hong of the fourth part; and

(5) Cheng Chee Tock, Theodore [Cheng] of 2B-2C, Shui Fai Terrace, Stubbs Road, Hong Kong of the fifth part.

Whereas:

(a) Flow Chart and Quintuplet have through their bankers opened letters of credit in favour of diverse entities for the purchase of computers and computer parts.

(b) Flow Chart and Quintuplet have asserted that the said letters of credit were opened at the request of Horizon pursuant to agreements for loans between Flow Chart/Quintuplet and Horizon. Horizon disputes this assertion and contends that the same were opened pursuant to a joint venture agreement between Flow Chart and Horizon.

(c) By an alleged deed of assignment dated 12 January 1989, Flow Chart/Quintuplet assigned in favour of Lucky Wealth all the alleged indebtedness of Horizon said to be outstanding as at 12 January 1989 including the alleged indebtedness under the said letters of credit.

(d) On 16 January, 1989, Lucky Wealth instituted proceedings in High Court Action No. A248 of 1989 [A248/89] against Horizon for the sum of HK$25,984,027.55 said to constitute all the indebtedness of Horizon assigned in its favour. On 14 January 1989, on the basis of an undertaking given by Lucky Wealth for damages, Mr. Justice Wong granted an injunction against Horizon on terms set out in an order of that date.

(e) On 23 January 1989, Flow Chart through China Legal Affairs Centre sought to seek various reliefs in China including the arrest of Cheng and the freezing of his bank accounts in China.

(f) The said order of Mr. Justice Wong was discharged by Mr. Justice Liu on 2 February 1989 without prejudice to contentions of Lucky Wealth and Horizon as to the propriety of obtaining or entitlement to the said order and against additional undertakings given by Flow Chart and Quintuplet.

(g) On 22 January 1989, Lucky Wealth laid a complaint with the authorities in Taiwan.

(h) On 17 April 1989, pursuant to leave granted by Mr. Justice Mayo in A248/89, Lucky Wealth issued a notice of motion in High Court miscellaneous proceedings No. 740 of 1989 [740/89] for an order against Cheng for committal and for an order of sequestration against the property of Horizon. Lucky Wealth has sought to support the said notice of motion by evidence which Horizon and Cheng contend to be hearsay or otherwise inadmissible.

(i) The parties hereto wish to settle their differences outlined above and have for that purpose agreed to enter into this deed of settlement.

Witnesseth Wherefor the Parties Hereby Agree That:

1(a) Upon execution of these terms of settlement by all the parties thereto, Lucky Wealth and Horizon do jointly apply to the Supreme Court of Hong Kong for an order in A248/89 in terms set out in (b) hereunder:

(b) The terms are:

Upon, the undertaking of Cheng to this Court that:

(i) save for an existing mortgage in favour of the Nanyang Commercial Bank, he will not encumber or sell or in any manner charge or dispose of the property at No. 2B-2C Shui Fai Terrace, Stubbs Road, Hong Kong registered in his name or any interest therein without giving notice to Lucky Wealth at its registered office;

(ii) in the event of Cheng wishing to further encumber or sell the said property or any interest therein, Cheng shall furnish to the satisfaction of Lucky Wealth alternative security to the value of the said property as at the date of the said notice subject to the said mortgage;

(iii) to take such steps as may be necessary to enable Lucky Wealth to register this undertaking given to this Court in the Land Registry.

It is ordered that all further proceedings in this action be stayed upon the terms of settlement agreed between the parties set out in the Schedule hereto except for the purpose of having the said terms carried into effect and that there be liberty to apply for the said purpose.

Schedule:

(i) Horizon do on or before 22 May 1989 pay to Lucky Wealth the sum of HK$1,000,000.

(ii) Horizon do on or before 8 July 1989 pay to Lucky Wealth a further sum of HK$1,000,000.

(iii) Horizon do on or before the dates specified hereunder pay into Account No. 040110421 of China Precision Machinery Import & Export Corp. at the Bank of China Main Branch, Beijing, China, the sums in RMB as set out hereunder:

Amount	Date
RMB¥1,052,500	1 November 1989
RMB¥1,052,500	1 May 1990
RMB¥1,500,000	1 August 1990
RMB¥1,500,000	1 November 1990
RMB¥1,500,000	1 February 1991
RMB¥1,500,000	1 May 1991
RMB¥ 315,000	1 November 1991
RMB¥8,420,000	

(iv) In default of payment of any of the sums specified in (i) to (iii) above or in the event of breach of any of the terms of the deed of settlement and after expiration of 14 days from date of service of a notice by Lucky Wealth on Horizon at its registered office in relation to the said default, all sums or such balance still payable by Horizon as set out above shall forthwith become due and payable in the respective currencies as stated above.

(v) Horizon do waive all claims that Horizon may have against the undertakings given by Lucky Wealth, Flow Chart and Quintuplet in these proceedings and such undertakings are hereby released.

(vi) Lucky Wealth and Horizon do waive in favour of each other all orders for costs in these proceedings obtained by one against the other.

(vii) There be no further order for costs.

2. Upon execution of this deed of settlement by the parties hereto:

   (a) Flow Chart and Quintuplet shall each apply to be joined as a co-plaintiffs in 740/89. Horizon and Cheng shall consent to such joinder.

   (b) Lucky Wealth, Flow Chart and Quintuplet shall have the application called on for trial and shall consent to the dismissal of proceedings 740/89 with no order as to costs.

3. Clauses 3 to 8 hereof shall come into operation upon the making of the order by the Supreme Court of Hong Kong in terms outlined in paras. 1 and 2 above. In the event of the Court refusing to sanction any of the aforesaid orders this deed shall forthwith become void and of no effect.

4. Upon execution of this deed, Flow Chart, Quintuplet and Lucky Wealth, without prejudice to Lucky Wealth's rights under this deed of settlement, jointly and severally waive in favour of Horizon and Cheng:

   (a) All and any alleged indebtedness that may exist between Flow Chart/Quintuplet/Lucky Wealth on the one hand and Horizon on the other hand. Flow Chart, Quintuplet and Lucky Wealth warrant in favour of Horizon and Cheng that no person other than themselves has any interest in the said indebtedness.

   (b) All claims that any one of them may have to any assets of any alleged joint venture between Flow Chart/Quintuplet and Horizon including in particular the computers and computer parts purchased through the said letters of credit including the proceeds of sale thereof if any.

5. Cheng hereby guarantee in favour of Lucky Wealth payment by Horizon of each and every of the sums in the respective currencies as set out in para. 1(b) above.

6. To the extent only that it may be lawful so to agree and in particular in the light of ss. 90 and 91 of the Criminal Procedure Ordinance each party undertakes in favour of the other to the extent only that it may be lawfully done and no further:

   (a) To take all steps that are available and may be necessary or expedient so as to withdraw any proceedings or complaint pending in China or Taiwan or any jurisdiction pertaining to any of the matters being the subjects of A248/89 and 740/89.

   (b) Not to institute any other proceedings or lodge any other complaint of whatsoever nature in any jurisdiction in relation to any of the subject matter of A248/89 and 740/89.

7. The terms set out herein are inter dependent on each other and the breach or failure to observe any of the provisions herein by Lucky Wealth, Flow Chart and Quintuplet on the one part and Cheng and Horizon on the other part shall forthwith discharge the parties of the other part from further performance.

8. All parties hereto acknowledge that the provisions in this deed of settlement are confidential to all the parties hereto to include all officers, directors and servants thereof and each party undertakes in favour of all the others not to disclose any of these provisions to any person not a party to this deed, save as may be necessary for the purpose of implementing this deed of settlement. It is hereby agreed that neither party shall be in breach of this clause by disclosing any matters contained herein if compelled to do so by any Court or authority of competent jurisdiction.

The requirements of Clauses 1 and 2 were duly satisfied so that the remainder of the deed (Clauses 3 to 8) became operative as provided in Clause 3. The order for the stay made pursuant to Clause 1(b) is the Tomlin order of 9 May 1989 which is the subject of this appeal. After recording the undertakings given by Mr. Cheng to the Court in the terms set out in Clause 1(b) of the deed, the order continued:

> It is ordered that all further proceedings in this action be stayed upon the terms of settlement agreed between the parties set out in the Schedule hereto except for the purpose of having the said terms carried into effect and that there be liberty to apply for the said purpose.

The Schedule which followed duplicated the Schedule in Clause 1 of the deed.

Horizon duly paid Lucky Wealth the first instalment of HK$1,000,000 provided in para. (i) of the Schedule, but before the next was due Mr. Cheng claimed that no steps had been taken to withdraw the Taiwan and China complaints. Treating this alleged failure as a default under Clause 7, Horizon did not pay the second instalment due by 8 July 1989, whereupon Lucky Wealth gave notice under para. (iv) of the Schedule and then applied to the High Court under the leave reserved in the order for final judgment that Horizon pay it HK$1,000,000 and RMB¥ 8,420,000 to China Precision Machinery Import and Export Corporation. The application came before Liu J, with Horizon claiming to be released by Clause 7 from all further obligations by reason of the defaults referred to above.

By consent the argument was confined to the preliminary point of whether a breach of Clause 7 could constitute a defence, it being assumed for this purpose that there were breaches nullifying the deed of settlement as alleged. Liu J held that Horizon should not be precluded from invoking the provisions in the deed in defence of Lucky Wealth's claim, and accordingly ruled in Horizon's favour on the preliminary point. He adjourned the application for judgment and gave directions for its hearing. From that decision Lucky Wealth appealed successfully to the Court of Appeal, which concluded that the Tomlin order was absolute in its terms and could not be read together with and subject to the deed. The matter now comes before their Lordships on appeal from that decision.

Counsel informed their Lordships that there is no direct authority in England or Hong Kong for the proposition that a party to a Tomlin order, faced with a claim to enforce the Schedule, may rely as a defence on contractual rights not included in that Schedule. It is, of course, a feature of such orders that the Schedule forming the basis of the stay of proceedings is not part of the order: it is simply a record of the compromise reached between the parties.

The present nature and scope of the Tomlin order is fully set out in the following passage from Vol. 23 of *Atkin's Court Forms* (2nd Edn. 1988) at p. 197:

> A form of consent order commonly found in the Chancery Division where the parties are *sui juris* is the Tomlin order, in which the terms agreed between the parties are set out in a schedule and all further proceedings in the action are stayed except for the purpose of giving effect to the terms, for which purpose liberty to apply is given. The terms are not part of the order, and if a term is not observed by a party, application under the liberty to apply will usually be necessary to give effect to it. If by a term a party is to pay a sum of money to another party and does not carry it out, application must be made for an order for payment to enable judgment to be entered and execution to issue. It should be particularly noted that if by one of the terms a party gives an undertaking to do, or to refrain from doing, something, the undertaking is not an undertaking given to the Court: it is merely an agreement between the parties.
>
> Terms scheduled to a Tomlin order represent an arrangement between the parties, and the Court is not concerned with approving them although it may properly offer suggestions upon them if it appears to the Court that they may cause some difficulty.
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> The terms need not be within the ambit of the original dispute but the Court will refuse to enforce terms which are too vague or insufficiently precise.

Accordingly it will be appreciated that the appellant's attempt to invoke the terms of the deed cannot be rejected on the simple ground that the Schedule is to be treated as the final order of the Court. However it is clear that as a record of the parties' agreement it is unambiguous and self-contained; the only reference to the deed is in para. (iv) which provides that any breach of its terms will accelerate payment of the total. The Schedule does not incorporate or refer to any other provisions of the deed and this was regarded as a powerful factor by the Court of Appeal in support of its view that they were separate and independent documents.

In the course of Counsel's submissions to their Lordships the construction of the deed was discussed at some length, raising points which their Lordships were informed had not been taken in the Courts below. Crucial to the appellant's case are the provisions in Clause 7 that the "terms set out herein are interdependent on each other", and that "breach or failure to observe any of the provisions ... shall forthwith discharge the parties of the other part from further performance".

The structure of the deed may suggest a division between Clauses 1 and 2 on the one hand, and Clauses 3 to 8 on the other: and that Horizon's obligation thereunder in relation to payment was duly performed once it had joined in the application for the Tomlin order envisaged in Clause 1(b). There is no requirement in the remainder of the deed for Horizon to pay anything. That obligation arises only in the Schedule of agreed terms for the stay of execution. On this approach any default by Lucky Wealth under Clause 7 would be ineffective to discharge Horizon, that clause applying only to further performance of obligations still outstanding under the remainder of the deed, for example, Mr. Cheng's guarantee under Clause 5, and the provisions of Clause 6.

Their Lordships consider that such an approach would be over-refined and inconsistent with the manifest intention of the parties that Horizon's obligation fundamental to the compromise - Was to pay the instalments, the Tomlin order being no more than a convenient procedure for its enforcement. It is also clear that Clause 7 was intended to be of general application, this being demonstrated by its emphasis on the interdependence of "the terms set out herein" and its reference to breach of "any of the provisions herein". These expressions must include the terms and provisions of the Schedule, which also form part of the deed, being described in Clause 1(b) thereof as "the terms of settlement agreed between the parties".

Counsel rightly accepted that the deed has not been superseded by the Tomlin order and is still effective among the parties. They also accepted (as did the Court of Appeal) that a party could seek a remedy by independent action in respect, of any default thereunder, a declaration and injunction being mentioned as appropriate in this case. The existence of such independent remedies under the deed which might enable Horizon to resist the respondent's claim suggests a degree of artificiality in the proposition that the terms of that document cannot be used directly as a defence, in the way Horizon now seek to do.

The parties entered into this deed to resolve the complex situation which had developed among them. As part of that settlement Horizon were to pay the amounts set out in the Schedule. That Schedule is clearly an integral part of the deed, but put, as it were, in parenthesis to take advantage of the Tomlin order procedure for summary judgment, so that the payments could be quickly and cheaply enforced. In their Lordships' opinion, the segregation of those items for that purpose does not remove them from the operation and effect of the rest of the deed. The whole of that document could have been incorporated in the Schedule, but to do so would have been unwieldy and unnecessary. Sensibly, the parties' advisors put in only those terms which were most appropriate for summary enforcement.

Nevertheless, as part of the deed, they remain subject to all its provisions. Accordingly it is open to Horizon to raise an allegation of default under Clause 7 as a possible defence to Lucky Wealth's claim to enforce the order.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of Liu J restored, with such modification of the directions for hearing as he may see fit to make. The respondent must pay the appellants's cost here and before the Court of Appeal.

Also found at [1992] 1 CLJ 603